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January 18, 2010

State Water Resources Control Board
Division of Water Rights
1001 "I" Street, 14th Floor
Sacramento, CA 95814-2000

Attn: Mr. Richard Satkowski

Re: Fresno River - Channel Percolation/Losses

Dear Mr. Satkowski:

The issue of the right of the Bureau of Reclamation to the Fresno River channel percolation/losses under Application 18733 (Permit 16584) during periods of non-growth of crops, no apparent irrigation demand, prompted this letter.

Application 18733, Decision 1407, Permit 16584

The United States Bureau of Reclamation (Reclamation) filed Application 18733 with the State Water Resources Control Board (SWRCB) for a permit to appropriate unappropriated Fresno River water discharging or reaching the San Joaquin River. A public hearing was held by the SWRCB 13 January 1971 and Decision 1407 was adopted 04 January 1973.

Statements in Decision 1407 are set forth as follows:

(1) 2. "The approximately 23,800 a.f. conserved by the project will be used for irrigation in the Fresno River Basin downstream from the site of Hidden Dam and it will supplement local groundwater supplies, natural runoff in streams, and water from the applicant's Millerton Lake (RT7)." (D1407, page 2). RT7 was based upon the Fresno River flow reaching the San Joaquin River.

(2.) 3. "No evidence was presented at the hearing to support the direct diversion feature of Application 18733." (D1407, page 2).

(3) 7. "A study by the applicant of pre-project conditions for the years 1922-1951 shows the average annual surplus flow of the Fresno River, which reached the San Joaquin River, was 19,900 acre-feet (U.1 Routing Study, Column 4: Applicants Exh. 12.)." (D1407, page 4).

(4.) 7. "A revision of the applicant's study has been made by the Board's staff to conform it with the aforementioned additional rights and to update the study to cover years 1952 through 1967." "The revised study shows that the flow in the Fresno River exceeded the face value of prior rights and channel percolation losses in 10 years of the 16 years of record (Table 1; Plate II). The duration of such surplus flow varied from one day (1963, 1966) to 47 days (1967) and varied in quantity from approximately 1,522 acre-feet (1964) to 52,738 acre-feet (1958) Table 1)." (D1407, page 5) emphasis added.

(5.) 12. "The Fresno River flows reach the San Joaquin River only in years of greater flow than the mean annual runoff (RT. 84)." (D1407, page 7).

(6.) Table 1 (Attachment to D1407 and this letter) headings state:

- "Period When Flow Exceeded Downstream Prior Rights and Channel Losses, in Days."
- "Amount Exceeding Downstream Prior Rights and Channel Losses in Second-Foot Days."

- The application and permit, after hearing and consideration of the SWRCB staff, provided an allocation of water to Reclamation for storage at Hidden Dam (Hensley Reservoir) based upon flow that historically "reached the San Joaquin River" (page 4, Occurrence of Surplus Water).

- The quantity of surplus flow of the Fresno River reaching the San Joaquin upon which the application was made by Reclamation and the permit issued by the SWRCB was determined after consideration of "Downstream Prior Right and Channel Losses." (Table 1)

- There was no evidence submitted to the SWRCB by the applicant, Reclamation, nor consideration, including the revised study by the Board's staff, by the SWRCB of an allocation of channel losses to Reclamation.

Channel Losses Percolating Waters

Statements extracted from Hutchins and Slater are provided as follows:

"It is essential to the nature of percolating waters that they do not form part of the body of flow, surface or subterranean, of any stream. They may either be rain waters which are slowly infiltrating through the soil, or they may be waters seeping through the banks or bed of a stream which have so far left the bed and the other waters as to have lost their character as part of the flow." [1] (Hutchins, page 426) emphasis added

Percolating waters are a part of the soil, and belong to the owner of the soil. [1] (Hutchins, page 430)

Waters that have so far left the bed and other waters of a stream as to have lost their character as part of the flow, and that no longer are part of any definite underground stream, are percolating waters. [2] (Hutchins, page 427).

The overlying right attaches to percolating water, which includes all groundwaters that are not underflow or subterranean stream, and underground water basins. [3] (Slater, page 329)

The right to the use of percolating water, as well as the corpus of the water itself is real property. The right of the plaintiff as the owner of certain lands to take waters from the underlying supply for use on such lands declared "that such right is parcel of said lands." [4] (Hutchins, page 428)

A Federal court stated in 1950, that in California, rights to the use of ground waters "whether flowing stored or percolating..... are part and parcel of the land, and as such are real property." [5] (Hutchins, page 429)

There never has been any statutory procedure in California for the appropriation of percolating water. (Hutchins, page 456)

[1] Vineland Irrigation District v. Azusa Irrigating Company, 126 Calif, 486, 494; 58 Pac. 107 (1899)

[2] Ibid, Montecito Valley Water Co. v. Santa Barbara, 144 Calif, 578, 588, 77 Pac. 1113 (1904)

[3] Ibid, Katz v. Walkinshaw 141 Cal 116, 139-140 [70P.663] [74P.766] (1903)

[4] Burr v. Maclay Rancho Water Co., 154 Calif. 428, 439, 98 Pac. 266 (1908)

[5] Rank v. Krug; 90 Fed. Supp 773, 787 (S.D. Calif 1950)

In Decision 1407, page 3, under Protestants, Menefee Ranch Company, Inc. warned the SWRCB that "approval of Application 18733 will interfere with the supply from its wells." which has been the case with the operation of the Fresno River by Reclamation and Madera Irrigation District.

Conclusion

The application 18733 of Reclamation, the public hearing of 13 January 1971, the testimony of Reclamation, the exhibits of Reclamation and the SWRCB staff, and Decision 1407 were all based upon the flow that exceeded downstream prior rights and channel losses, the surplus flow of the Fresno River that reached the San Joaquin River.

Only the **surplus flow of the Fresno River that reached the San Joaquin** was allocated by appropriation to Reclamation for storage in Hidden Dam (Hensley Reservoir) under Permit 16584, the record does not support otherwise.

With respect to the Fresno River channel losses, percolation of the stream flow, case law clearly establishes and supports the correlative ownership right of the overlying landowners. The percolating waters of the stream, the Fresno River, becomes groundwater, not under the jurisdiction of the SWRCB and therefor can not become a part of the appropriation of Reclamation under Application 18733 (Permit 16584).

This issue is now especially important since Madera Irrigation District is going to run the river in the absence of a storage/exchange agreement with the downstream riparians. The model allocates channel loss water under the assumption the channel losses have been stabilized at 86 cfs. The downstream riparians are going to be deprived of the natural flow water that would have otherwise pre-wetted the channel in the earlier months. Without question, the downstream users will not receive the amounts allocated to them unless additional channel loss water is either allocated or released to pre-wet the channel.

Very truly yours,

R. L. Schafer

Very truly yours,

Michael N. Nordstrom

Very truly yours,

Douglas B. Jensen

RLS/mep

cc: Kevin Long
Michael Campos
Lance Johnson
Dick Tzou
Jim Turner
Ed Salazar
Janice Webb
Darrin Williams
Dennis Keller

TABLE 1

Year	Period When Flow Exceeded Downstream Prior Rights and Channel Losses in Days	Amount Exceeding Downstream Prior Rights and Channel Losses in Second-foot Days
1952	21	12,255
1953	0	0
1954	0	0
1955	8	21,230
1956	8	6,877
1957	0	0
1958	25	26,369
1959	0	0
1960	0	0
1961	0	0
1962	14	11,232
1963	1	2,245
1964	4	761
1965	2	1,220
1966	1	2,780
1967	47	22,404
	16/ 131	16/ 107,373
	8 + days/yr.	6,710 sec. ft. days/yr.